

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

VICTOR MOCANU : CIVIL ACTION

v. :

ROBERT S. MUELLER, et al. : NO. 07-0445

MOHAMMAD BARIKBIN : CIVIL ACTION

v. :

UNITED STATES, et al. : NO. 07-3223

TONGZIAO ZHANG : CIVIL ACTION

v. :

MICHAEL CHERTOFF, et al. : NO. 07-2718

ANDREW O. NEWTON, M.D. : CIVIL ACTION

v. :

DONALD MONICA, et al. : NO. 07-2859

MEMORANDUM AND ORDER

Defendants filed an Emergency Motion for Stay Pending Appeal of this Court's Order, dated February 8, 2008, and the Plaintiffs have filed a response. The Court held a hearing on February 27, 2008 in open court.

Although Defendants' counsel presented many arguments as to why a stay should be granted, no appeal has been filed. They advise that the issue of whether to appeal is under review

by the Solicitor General's Office and, therefore, the Court should grant a stay to allow more time to consider whether an appeal will actually be filed. Without necessarily agreeing that the matter is an emergency or otherwise ripe for decision, the Court will consider the merits of the Motion.

Defendants assert most vigorously that they have satisfied the requisites for a stay, that the Court erred in its legal conclusions and in the relief granted, and the United States Citizenship and Immigration Services ("USCIS") will suffer irreparable harm unless a stay is granted pending an appeal. Plaintiffs dispute the Defendants' contentions.

One of the points of contention is the interpretation of paragraph 7 in the Court's Order of February 8, 2008. Defendants assert that the phrasing of the Order has prevented USCIS from adjudicating any of these Plaintiffs' petitions because it could not consider the result of the Federal Bureau of Investigation ("FBI") name check without instituting the notice and comment procedure, leading to new regulations, which USCIS is apparently unwilling to do without exercising its appellate rights.

Counsel for USCIS then advised the Court that although USCIS recently received the results of the FBI name check for these four Plaintiffs, because of the phrasing of paragraph 7 of the February 8, 2008 Order, USCIS took the position it could not review those results, and did not know what the results were. Upon learning this fact, Plaintiffs' counsel agreed that it would be in their clients' interest for the Court to rephrase paragraph 7 and to give the Defendants some reasonable time to review the results of the FBI name check. If the name check did not reveal any derogatory information, the Plaintiffs presumably would be promptly interviewed, and assuming all requisites for naturalization have been met, their petitions would be adjudicated and the Plaintiffs would be naturalized, thus arguably making these cases moot. The record will

reflect that the Defendants' counsel did not make any commitments or promises as to any specific action in any specific case.

Nonetheless, all counsel and parties agreed that the Order of February 8, 2008 should be revised as follows:

7. As of March 28, 2008, unless USCIS has initiated a notice and comment procedure pursuant to the Administrative Procedure Act concerning its use of the FBI name check procedure, it shall be enjoined from using the FBI name check program as a factor in the decision making as to these Plaintiffs.

8. The parties shall file reports no later than March 31, 2008 as to their position.
10. The Court will schedule a hearing as may be necessary or appropriate.
11. The Defendants' Emergency Motion for Stay Pending Appeal is DENIED, without prejudice.

BY THE COURT:

s/Michael M. Baylson

Date: 2/27/08

Michael M. Bayson, U.S.D.J.